United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1925

To be argued by
JEROME L. MERIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1925

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM LEE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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Preliminary Statement

William Lee appeals from a judgment of conviction entered on June 27, 1974, in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Charles L. Brieant, United States District Judge, and a jury.

Indictment 73 Cr. 1007 charged William Lee in four counts with knowingly making false material declarations while under oath in a proceeding before a grand jury of the United States, in violation of Title 18, United States Code, Section 1623.

The trial began on November 14, 1973. On the evening of November 16, 1973, the jury acquitted Lee on Count Four of the indictment. On November 17, 1973, after further deliberation, the jury found Lee guilty on Counts

One and Three of the indictment and acquitted him on Count Two.

After the determination of post-trial motions,* Lee was sentenced on June 27, 1974 to six months imprisonment on Count One and one day's imprisonment on Count Three to be served consecutively to the sentence imposed on Count One. Lee was released on $500 bail pending this appeal.

Statement of Facts

The Government's Case

On April 25, 1973, William Lee, a Newburgh police sergeant, appeared before a federal grand jury which was investigating, among other things, alleged violations of Title 18, United States Code, Section 1511, which punishes as a federal crime payoffs by organized gamblers to local police officers (Tr. 276-280). Lee denied that he had received money from a Newburgh gambling business operator named Allan Handler, denied that he had ever received money or property from persons other than relatives or employers, and denied that he had ever picked up money from a Newburgh "hustler and gambler" named Pee Wee Boone.**

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* The District Court denied these motions in an opinion dated June 14, 1974 (Appellant's Appendix, Ex. C).

** The testimony charged as perjurious in the Counts on which Lee was convicted was as follows:

(COUNT ONE)

Q. Did you ever receive any money from Mr. Handler? A. No, sir.

Q. Other than money from relatives and money from the employments that you have just mentioned and money from the Police Department, have you received from any individual? A. No, I have not.

Q. You are positive of that? A. I'm positive of that.

Q. Have you received any property of any sort from

[Footnote continued on following page]

At trial, the Government called seven witnesses who either took part in, observed or heard Lee speak of illegal payoffs in which Lee was involved.

Humbert Cappelli, the convicted former Newburgh Chief of Police, testified that on one occasion in the fall of 1969, while he was accompanying Lee on patrol, Lee told him that he was accepting money from Handler (Tr. 170-171). On another occasion in late 1969 or early 1970, Cappelli observed Lee receiving money from a Newburgh bar owner named "Red" Skipwith, who had been arrested numerous times for gambling violations (Tr. 172-74). Cappelli also testified that at about the same time, he was with Lee outside a Newburgh house of prostitution run by a madam named Nell Williams and saw Williams hand something to Lee (Tr. 176). Shortly after this, Lee said, "I got my ten. What did you get?" (Tr. 176).

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any people other than employers that you have just mentioned or your relatives? A. No, I haven't.

* * * * *

Q. *Has Allan Handler ever handed you money?* A. *No, he hasn't.*

* * * * *

Q. *Did Allan Handler ever hand you a bag?* A. *No, he didn't.*

Q. *Did Allan Handler ever hand you an envelope?* A. *No, he didn't.*

* * * * *

(COUNT THREE)

Q. *Did any people pay you bribes?* A. *No, they didn't.*

Q. *To the best of your recollection—I'm sorry, no one has paid you bribes, is that correct?* A. *No, they haven't.*

Q. Do you know Earl Manley Boone? A. I know a Pee Wee Boone.

Q. Pee Wee Boone.

Q. *Has he ever picked up money from you?* A. *No, he hasn't*

Q. Did you ever pick up money from him? A. No, sir.

(The italicized portions were stricken by the District Court and not submitted to the jury for consideration.)

John R. Maney, another former Newburgh police officer, testified that at Christmas in 1968 and again in 1969, he and Lee received money and other gifts from Skipwith (Tr. 199-201, 211-215, 216-220). Maney also said that once in 1964 he accompanied Lee to Skipwith's bar, after Lee said that he was broke and needed money (Tr. 204-206). Maney saw Lee meet with Skipwith, saw Skipwith hand something to Lee, and later saw Lee with money (Tr. 204-206).

Acrel Simon testified that in 1969 and 1970 he lived in Newburgh, was employed as a numbers runner by Allan Handler and knew Lee as a police officer (Tr. 36-37). Simon testified that during the summer of 1970, he and Allan Handler drove to Downing Park, Newburgh, New York, where Handler pulled up next to Lee's patrol car and dropped an envelope into the car through an open window (Tr. 40, 46-47, 56-59, 61, 91-92).

August Smrek, another gambler employed by Allan Handler, testified that in the fall of 1969, he handed Lee an envelope, in an apartment house parking lot in New Windsor, New York, telling him, "This is from Allan"* (Tr. 234, 236-237, 241).

Testimony by Pee Wee Boone, a gambler and "hustler," established that as early as 1969, Boone knew both Nell Williams and Lee and on various occasions ran small errands for Williams (Tr. 133-134, 159-160). Boone testified that sometime in the autumn of 1969 he delivered an envelope from Williams to Lee, who was parked in a police car outside Williams' house of prostitution (Tr. 134-135). Boone testified that he was able to see at least one $20 dollar bill in the envelope, but could not tell how many more bills it contained (Tr. 135-136).

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* Smrek could not recall whether Handler himself, or a girl named Dolores Mitchell, had actually given him the envelope for Handler (Tr. 242).

Betty Jane Price, a prostitute, testified that from 1968-1970 she was employed by Nell Williams in the latter's house of prostitution in Newburgh, New York (Tr. 101, 110). Price stated that on at least four or five occasions she had seen William Lee in the presence of Nell Williams at the brothel, and on one occasion observed Williams take a strongbox from a closet, remove money from the box, place the money in an envelope and hand the envelope to Lee (Tr. 102, 108-109, 111-115).*

Thomas Stacklum, another convicted Newburgh Police Officer, testified that on August 23, 1970, at the Newburgh Police Station, Lee told him that he had taken $100 from an amount of money which had been found during an arrest made the night before (Tr. 258-261).

The Government's final witness was Frank Filzen, the foreman of the August 1972 Federal Grand Jury before which William Lee appeared (Tr. 276). Filzen testified that the grand jury was investigating "gambling, local obstruction of justice by payoffs and bribery" in Newburgh, New York, and that appellant Lee had been called before the grand jury, had been sworn and had testified (Tr. 276-280).**

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* The trial court ruled that the jury could not consider the Price, Boone and Cappelli testimony about Nell Williams paying Lee on Count One, since a separate Count, Count Two, specifically charged Lee with denying the receipt of money from Williams (Tr. 454-455).

** It was stipulated that the transcript prepared by the grand jury stenographer, William Blitz, was a complete and accurate transcription of the testimony given by William Lee on April 25, 1973 before the grand jury (Tr. 280-284). Government's Exhibit 2, the transcript of William Lee's testimony before the grand jury was then received into evidence (Tr. 281).

The Defense Case

William Lee took the stand in his own defense (Tr. 335-388). Lee denied receiving any monies or envelopes from Allan Handler or Nell Williams (Tr. 339, 341). Lee also denied receiving money from Acrel Simon or even knowing that Simon was in Handler's employ (Tr. 339-340). Lee stated that he knew August Smrek as a narcotics violator, but denied ever having been at the place where Smrek said that he had given Lee an envelope from Handler (Tr. 360-361).

Lee testified that he knew Pee Wee Boone and indeed had arrested him, but denied receiving any money from Boone (Tr. 341). Lee said his only recollection of Betty Jane Price arose from an incident at a bar in Newburgh when he threatened to arrest Price and Boone for "hustling customers" (Tr. 346). Lee also testified that he knew Nell Williams. Although Lee admitted on cross that he had consumed liquor at her place, he claimed he was only there to "see if there was any illegal activity going on" (Tr. 353, 383-384).

Throughout his direct testimony Lee denied receiving money or gifts from persons other than employers or relatives (Tr. 339-340, 341). On cross-examination, Lee, however, conceded that he had received money and other property from persons other than his employer:

> "Q. It is your testimony as I understand it, that during those eleven years you never received moneys or property from anyone other than legitimate employers; is that correct, sir? A. It's my testimony that the way I——
>
> Q. Is it correct, sir? A. That I never received bribes.
>
> The Court: He is asking you about money or property.
>
> Q. I am asking for moneys or property. I would appreciate it if you would give me a yes or no answer. A. I received moneys, yes; I have.

Q. Did you receive moneys? A. Yes, I did.

Q. From people other than your employers? A. Yes, I did.

Q. How about property, did you receive property from people other than your employers? A. What do you mean by 'properties,' sir?

Q. Oh, liquor, gifts, other than relatives or employers. A. I would say I received liquor a couple of times.

Q. How about other gifts, candy, pens? A. Maybe a box of candy a couple of times.

Q. Pens? A. I don't recall ever receiving a pen, sir" (Tr. 350-51).

ARGUMENT

POINT I

Appellant's false statements were material to the grand jury's investigation.

Lee contends that his denials, before the grand jury, of having received money from Handler, Boone and others were not material to the grand jury's investigation because both the grand jury and the prosecutor already knew the truth before he testified. The argument is wholly without merit.

In *United States* v. *Carson*, 464 F.2d 424, 436 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972) this Court unequivocally rejected this same argument as follows:

> "The second claim is that since the prosecution had the tape recordings of the conversations held in Senator Fong's office as well as the testimony of Brant and Hellerman there was no doubt whatsoever that appellant had met the persons inquired

about, and therefore appellant's answers to the questions were not material to the grand jury investigation. Appellant misunderstands the purpose and operation of the perjury statute, 18 U.S.C. § 1621. 'Essentially, the statute punishes lying under oath before a federal official or tribunal. . . . To be within the reach of section 1621, the lies must be material, which in this case means that "the false testimony . . . [must have] a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation."' United States v. McFarland, 371 F.2d 701, 703 (2d Cir. 1966), cert. denied, 387 U.S. 906 87 S. Ct. 1689 18 L. Ed. 2d 264 (1967); United States v. Marchisio, 344 F.2d 653, 665 (2d Cir. 1965). The natural effect or tendency obviously flows from an assumption on the part of the speaker that the tribunal will believe what he says. *On this basis materiality refers to the connection between the words said only by the accused and the objective of the investigation; other testimony which the grand jury has heard, except as it may tend to delimit the objective of the inquiry, is therefore irrelevant to a determination of materiality.* And we think it equally obvious that had appellant's false statements been believed, the natural effect would have been to impede the grand jury's investigation" (emphasis added).*

Furthermore, it is perfectly clear that appellant's lies to the grand jury frustrated a whole line of inquiry into such important questions as the identities of all the persons who had paid him bribes, whether he had shared illegal payoffs with other policemen or government officials,

* It should be noted that the materiality requirement under § 1623 is the same as that under 18 U.S.C. § 1621, the older statute. *United States* v. *Mancuso*, 485 F.2d 275, 280 n. 15 (2d Cir. 1973).

1. Materiality

Whether testimony is material is a question for the trial court to determine. *United States* v. *Mancuso, supra,* 485 F.2d at 280; *United States* v. *Stone,* 429 F.2d 138, 140 (2d Cir. 1970) *United States* v. *Alu,* 246 F.2d 29, 33 (2d Cir. 1957). Judge Brieant's charge on materiality * simply

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* The instruction on materiality was as follows:

"That the matters or questions as to which it is charged that he gave false answers were material to the issues which were then under inquiry by that grand jury.

Now, in the present case there is no serious dispute that the defendant, William Lee, appeared before a grand jury of the Southern District of New York and that he took an oath before the grand jury to testify truly and that such grand jury was authorized by law to administer oaths and was duly impaneled.

The parties have stipulated, you will remember, that if the court reporter, Mr. Blitz, a man who takes the testimony in a grand jury on a stenotype machine, as this court reporter is presently doing here today, were called as a witness, he would testify that Exhibit 2 in evidence, which is a transcript, shows correctly the testimony which the defendant, William Lee, actually gave to the grand jury and, accordingly, you may find, based on that exhibit and the stipulation, that he did give the answers charged before the grand jury.

If you believe the testimony of Mr. Filzen, the foreman of that grand jury who testified before you, you must find that the testimony given was material. Mr. Filzen has testified that the grand jury of which he was then the foreman was investigating gambling, prostitution, corruption and other matters in Orange County, New York, which is where the City of Newburgh is, and all of which is within the Southern District of New York. It is the duty of the grand jury to investigate such matters which may have possible federal ramifications, and may constitute violations of federal penal statutes and any testimony which might give the grand jury a lead in digging out such federal crimes is material, so that I instruct you as a matter of law that the matters about which the defendant testified as set forth in the indictment were material to the issues under inquiry by that grand jury before which the testimony was given and that the grand jury was acting within its rights and powers" (Tr. 448-49).

announced this rule of law to the jury and instructed them that their only function with respect to this element of the offense was to determine whether the grand jury foreman was telling the truth when he described what the grand jury was investigating. Thus, the charge was entirely correct.

2. Circumstantial Evidence

Lee contends that Judge Breiant committed reversible error because he failed to instruct the jury "that where two inferences are equally available—guilt or innocence—the defendant is entitled to the favorable inference" (Br. at 25). Since this Circuit has squarely rejected the "two inferences" rule, *United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States* v. *Fiore*, 467 F.2d 86, 88 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973); *United States* v. *Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970), and since the instructions given on circumstantial evidence (Tr. 442-43, 455-56) were correct, appellant's claim of error is without merit.

As described in the Statement of Facts, *supra*, Count One accused Lee of lying when he denied receiving money from a gambling business operator named Alan Handler, or from other persons who were not relatives or employers. The Government's proof of the falsity was (1) former Newburgh Police Chief Cappelli's testimony that Lee admitted to him that he had received money from Handler; (2) Acrel Simon's testimony that he observed Handler deliver an envelope to Lee; (3) August Smrek's testimony that he delivered an envelope to Lee, telling him, this is from "Alan"; (4) Cappelli's testimony that he had observed Lee receiving money from a Newburgh gambler named "Red" Skipwith; and (5) Maney's testimony that he and Lee both received Christmas gifts of money and other things from Skipwith and (6) Lee's own admissions on cross.

Thus there was abundant evidence from which the jury could have inferred that the envelopes which Lee received from Handler contained money, especially in light of Cappelli's testimony that Lee had admitted receiving money from Handler, and the testimony of Price and Boone that they had actually seen money in other envelopes which Nell Williams, the brothel operator, had delivered to Lee. Nor did the jury have to ignore Lee's own damning admission on cross-examination that he had received money and other items from people other than his employer. Plainly, there was more than enough evidence from which "a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972).

POINT III

Section 1623 of Title 18, United States Code makes criminal the making of either false statements or contradictory statements.

Misreading a sentence in Section 1623(c), Lee makes the utterly frivolous argument that Section 1623 applies *only* to cases in which the Government proves the defendant's perjury by showing that he made "irrevocably contradictory" declarations under oath.

Section 1623(c) provides in pertinent part:

> "(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury."

The last sentence quoted obviously states one, and not the exclusive method for proving the falsity of the declaration alleged in the indictment.

Lee's construction of the statute is utterly contrary to the congressional purpose in enacting § 1623:

> "This title is intended to *facilitate* Federal perjury prosecutions and establishes a new false declaration provision applicable in Federal grand jury and court proceedings. It . . . *authorizes* a conviction based on irreconcilably inconsistent declarations under oath." 2 U.S. Code and Cong. Admin. News, 91st Cong. 2d Sess. (1970) at 4008 (emphasis added).

The analysis of Section 1623 in the House Report is unmistakably clear that subsection (c) was not intended to limit the ambit of the statute to irreconcilably conflicting declarations made by the defendant:

> "The subsection also provides that in a prosecution for violation of the section, the falsity of the declaration *may* be established sufficient for conviction by proof that the defendant while under oath made

irreconcilably contradictory declarations material to the point in question in a proceeding before or ancillary to a court or grand jury." (*Id.* at 4023; emphasis added).

POINT IV

The sentence was proper.

Lee complains that his sentence of six months and a day was unduly harsh, citing lenient treatment accorded recently to others more famous than he. Far from being unfair, the sentence was exceptionally lenient in light of all the circumstances, well within the statutory limits and imposed in a lawful manner. It is therefore not subject to appellate review. *United States* v. *Brown,* 479 F.2d 1170, 1172 (2d Cir. 1973); *United States* v. *Velazquez,* 482 F.2d 139, 142 (2d Cir. 1973).

POINT V

The Trial Court's "modified *Allen* charge" was entirely proper.

Lee contends that the trial court's "modified *Allen* charge" was coercive, especially in light of the fact that the jury had indicated before the supplemental charge was given that eight jurors stood "Yes"—presumably for conviction—on the two counts on which Lee was ultimately convicted. However, Judge Brieant's charge was in language virtually identical to *Allen* charges, including one of his own, approved by this Court; and this Court, in cases which Lee chooses to ignore, has very clearly held that the fact that the jury has volunteered that a majority is for conviction does *not* invalidate an otherwise proper *Allen* charge. In any event, Lee took no exception to the charge below, and thus is barred from complaining about it here.

1. The Facts

During the course of its charge, the District Court instructed the jury as follows:

> "In communicating with the Court, I should admonish you that you are not to indicate in your note how your vote may then be divided. You are not to tell us that in any note that comes from the jury" (Tr. 462).

The jury began its deliberations at 12:45 P.M. on November 16, 1974 (Tr. 465). At 5:10 P.M., the jury sent a note to the trial court stating, "We can't agree on any counts" (Tr. 465). Enclosed with the note was a piece of paper which read "On Count 1: Yes, nine; No, three. On Count 2: Yes, eight; no, four. On Count 3: Yes, eight; no, four. On Count 4: three yes, nine, no" (Court's Exhibit 3, Tr. 480).

Judge Brieant disclosed the existence of the ballot to counsel as follows:

> "The Court: Gentlemen, we have a note from the jury which says, "We can't agree on any counts."
>
> That's all it says.
>
> Also, they have enclosed with their note, contrary to my instructions, a ballot in which they indicate yes, no, as to each count. Now, that is absolutely contrary to the instructions given by the Court. The voting is different on the counts and I don't really think I am called upon to disclose it at this time but I will hear anybody who wants to be heard.
>
> I think it is premature to discharge them. Maybe they ought to be instructed further as to going about agreeing on the matter, if they can" (Tr. 465).

Lee made no objection whatsoever to the charge when the District Court returned from its recess (Tr. 466). The jury was then brought in and charged as follows:

> "The Court: Members of the jury, I have your note which reads, "We can't agree on any counts."
>
> Also, I am sure inadvertently, enclosed in that note was what appears to be a vote of some kind and I had stated that I did not want to be informed about any vote. I am disregarding that entirely. I have not read it in court and I don't intend to.
>
> Now, members of the jury, it is not my intention to discharge you at this time. By the same token, the Court does not propose to attempt in any way to compel you to come to an agreement but I think it is my duty to point out to each of you just what your obligation in that respect is. I ask you to listen carefully.
>
> Of course, in the end, every man and woman must answer to his or her conscience; that is, to do what he or she thinks is right, but every jury member must make an honest effort to see the point of the other men and women on the jury and to keep his or her mind open and not to get into an obstinate state of mind; to try and endeavor as far as he or she honestly can to give the most careful thought to what a majority of his or her fellow jurors believe to be the just and fair solution.
>
> You cannot do that if you are going to engage in shouting or yelling or raised voices, because nobody is ever convinced of anybody else's point of view by yelling or by discourtesy or anything like that.
>
> Now, I don't mean to say that after you have listened to each other fully and have discussed with an open mind with each other that a juror who is

absolutely convinced that the majority is wrong that he or she has not the right to abide by his or her own judgment. Of course, such a juror has that right and duty.

But, when one or more finds himself or herself or themselves in a minority or even if there is an equal division, it behooves every reasonable person to get into a condition of humility of mind as to his or her own process of reasoning and judgment and to consider and reconsider whether the majority, if there is a majority, or one way or the other, has not on the whole reached the soundest conclusion. That is something which you members of the jury should discuss with each other and see whether you can't reach a unanimous verdict. It is desirable from the viewpoint of both the government and the defendant that this case be disposed of. The government has an interest in seeing that the law is enforced, the defendant has gone through an ordeal. He is entitled to have a verdict, if it is possible, be it guilty or not guilty.

I am sure that would be his preference, one way or the other, but of course I say that without consulting him.

Now, our law compels a retrial unless the jury is unanimous and I have no reason to think that in a retrial another jury would receive any different evidence than you have received or that another jury would be composed of twelve men and women any better or any smarter than you folks are, so I would hope that you would try without raising your voices and without attempting to pressure anybody or pressure each other but in a decent way, with humility, go back there in the juryroom and talk about this case and see if you can't come to a just verdict without giving up your own personal con-

victions as to what the proper decision is on each of these counts.

You may withdraw to the juryroom" (Tr. 466-69).

After one hour and twenty minutes more of deliberation, the jury returned with a note as follows: "Does the majority rule?" (Tr. 469).

The District Court then charged the jury as follows:

"Members of the jury, the answer to that question is absolutely not and I really wonder whether you were listening to me. I will read to you again what I told you at the close of the case.

At that time I told you as clearly as I know how that each one must decide the case for himself or herself after consideration and discussion with your fellow jurors and I told you if, after carefully weighing all the evidence and the argument of your fellow jurors, you entertain a conscientious view which is different from the others, you are not to yield your judgment simply because you are outnumbered or outweighed or outvoted.

Your final vote is your own vote and must reflect your individual conscientious judgment as to how the case should be decided. In order to find the defendant guilty of any count, there must be a unanimous verdict as to that count.

Now, what I am asking you to do and what the main purpose of your deliberation is, is to thrash out the questions, go into the facts, discuss the evidence and exchange your views, with the hope that eventually all of the jurors will analyze this matter together and reach the same result, but, of course, if you can't, then it may be that you cannot and no one should give up his verdict simply because a majority may be against him.

> What he should do is listen to the views of the majority with an open mind and analyze them and discuss them and see whether perhaps the majority might be right. By the same token, those of you who may be in the majority should do the very same thing. You should listen to the views of the minority and analyze them and discuss them back and forth in a friendly way and see if you might be right" (Tr. 469-71).

After this instruction, the jury went to dinner. At 9:45 P.M., after the jury had deliberated for about another hour and one-half (Tr. 471), the District Court asked the jury if it had "reached a unanimous decision on any Count?" (Tr. 472). The jury then returned a verdict of Not Guilty on Count Four, and was excused for the night not long thereafter (Tr. 473-74).

Early on the morning of November 17, one juror was treated at a local hospital for "bleeding caused by diabetes," and then reported that he wanted to resume his deliberations and signed out of the hospital to return to the jury (Tr. 475). Later in the morning, after the jury had deliberated for a short period, Lee moved "for a mistrial." * The District Court denied the motion as premature (Tr. 481). At 11:30 A.M., the jury requested and had read to it portions of Lee's testimony relating his receipt of "property" from others ** (Tr. 481). At 11:50 A.M., Lee again moved for a mistrial claiming that "although the jury has not said that they are hopelessly deadlocked, every indication to us . . . would indicate that they are" (Tr. 482-483). The District Court, noting that the jury's request

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* Lee had also, earlier on the morning of November 17, renewed his motion, made at the close of the evidence, for an acquittal (Tr. 478, 389).

** In testimony charged as perjury in Count One, Lee had denied receiving either money or "property" from persons other than relatives and employers (Tr. 339-40) but had admitted receiving such on cross (Tr. 350-351).

for testimony was "highly germane to the matters contained in at least one of the counts, ruled that it would be "inappropriate to cut them short at this time" (Tr. 483-84).

At 1:20 P.M., the jury returned with a verdict of Guilty on Count One, Not Guilty on Count Two and Guilty on Count Three (Tr. 484-85).

2. The Law

This Court has already upheld as proper a charge of Judge Brieant's in almost identical language to that challenged in this case. *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973). For examples of similar "modified-*Allen* charges" approved by this Court, see *United States* v. *Jennings*, 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States* v. *Bowles*, 428 F.2d 592, 595-96 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

The jury's question whether "the majority rules", asked after the District Court's instruction, certainly reflected that at least one juror had been inattentive to the trial judge's perfectly clear instructions. However, the District Judge then explicitly charged the jury that unanimity was required, and stated even more forcefully tha nbefore the proposition that "you are not to yield your judgment simply because you are outnumbered or outweighed or outvoted" (Tr. 470). The jury's deliberations thereafter in no way suggested that they felt coerced. They deliberated for at least 7½ more hours,* during which they requested and heard some relevant testimony, and returned with a verdict convicting the defendant on two counts and acquitting

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* Compare *United States* v. *Hynes*, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970) and *United States* v. *Meyers*, 410 F.2d 693 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969) in which this Court sustained guilty verdicts returned five and thirty minutes, respectively, after "modified *Allen* charges" were given.

him on a third--a result plainly inconsistent with the notion that Judge Brieant's charge had coerced them to conclude that the defendant was guilty.

Although before the supplemental charge was read, the jury had indicated that it stood nine "yes" and three "no", presumably for conviction, on Count One and eight "yes" and four "no" on Count Three, this Court has explicitly held that such a circumstance does not invalidate an otherwise proper *Allen* charge where, as here, the trial judge does not invite the ballot. *United States* v. *Jennings,* 471 F.2d 1310, 1314 (2d Cir. 1973); *United States* v. *Meyers,* 410 F.2d 693, 696-97 (2d Cir.), *cert. denied,* 396 U.S. 835 (1969) (in both cases the jury had announced that they were 11-1 for conviction before the *Allen* charge). See also *United States* v. *Martinez,* 446 F.2d 118, 119-120 (2d Cir.), *cert. denied,* 404 U.S. 944 (1971); *United States* v. *Zeehandelaar,* 498 F.2d 352, 358 (2d Cir. 1974). Compare *United States* v. *Dunkel,* 173 F.2d 506 (2d Cir. 1949) (reversal where the trial court *invited* expression of majority).

In this case the Trial Court had expressly admonished the jury not to submit any ballots (Tr. 462). Thus, as this Court held in *United States* v. *Meyers, supra,* 410 F.2d at 697:

> "The fact that the judge knew that there was a lone dissenter does not make the charge coercive inasmuch as the nature of the deadlock was disclosed to the Court voluntarily and without solicitation. See Bowen v. United States, 153 F.2d 747 (8th Cir. 1946). To hold otherwise would unnecessarily prohibit the use of the Allen charge in circumstances where the judge was made aware of the numerical division of the jurors, for example, by an over-zealous juror, although he had not made the forbidden inquiry himself."

Furthermore, it is extremely doubtful that the presumed vice in giving an *Allen* charge after the jury has announced a majority for conviction—the possibility that the jury, *knowing that the judge is aware how the majority stands,* will think that the judge is expressing a bias for conviction—was present at all in this case. When the trial judge received the ballot he told the jury:

> "Also, I am sure inadvertently, enclosed in that note was what appears to be a vote of some kind and and I had stated that I did not want to be informed about any vote. I am disregarding that entirely. I have not read it in court and I don't intend to" (Tr. 466).

Then later during his *Allen* instruction, the judge asked the jurors to consider "whether the majority, *if there is a majority is correct"* (Tr. 468, emphasis added). Even assuming that the jury thought the judge would interpret its "Yeses" as votes for conviction, these remarks by the trial judge, which are about as close to fudging facts for a good cause as one can expect from a federal judge, gave the distinct impression that the judge had not even read the ballot.

Finally, of course, defense counsel's only comment on the entire proceedings was his statement, immediately after the expression of jury disagreement was disclosed, that he felt that further instructions "would not do anybody any good. I would rather see them fight it out some more" (Tr. 465). Given a copy of the Court's proposed *Allen* charge to read, defense counsel expressed neither objection as to its content nor suggestions as to possible additional language (Tr. 465), and therefore appellant is barred now from objecting that it was coercive, *e.g., United States* v. *Bowles, supra,* 428 F.2d at 596-97 n. 13; *United States* v.

Martinez, 446 F.2d 118, 120 (2d Cir.), *cert. denied,* 404 U.S. 944 (1971); *United States* v. *Chaplin,* 435 F.2d 320, 323 (2d Cir. 1970).*

POINT VI

The questions and answers submitted to the jury in Counts One and Three did not violate the rule announced in *Bronson* v. *United States.*

Invoking the decision of the United States Supreme Court in *Bronson* v. *United States,* 409 U.S. 352 (1973), Lee frivolously claims that he did not actually perjure himself when he replied "No sir" to the questions whether he had ever "received" money or property from Allen Handler or others (Count One) and the question of whether he had ever "picked up" money from Pee Wee Boone (Count Three). As for Count One, the evidence was ample to show that Lee had "received" money and property from Handler and others, and the questions and answers are unmistakably clear. With respect to Count Three, the proof established that Lee, parked in a police car in the driveway of a house of prostitution, had received an envelope full of money from Boone, who had gotten it from the madam inside the house and handed it to Lee at the car (Tr. 134-35; 143-45). Since the evidence left no doubt that Lee was

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* Lee's complaint on this appeal that trial counsel was "totally unaware" (Br. at 38) of how the jury stood in its ballot is simply disingenuous. Although the trial court indicated, when he revealed the existence of the ballot to counsel, that "I don't really think I am called upon to disclose it at this time", he immediately went on to say, "I will hear anybody who wants to be heard," and Lee's counsel did not even ask how the jury stood (Tr. 465). Later, when Lee's counsel did ask how the ballot had been on one count, the judge told him (Tr. 480).

making the rounds for a payoff, Lee's protest that Boone was delivering money to him, rather than he picking it up from Boone, is a simply unjustifiable waste of this Court's time.

POINT VII

Section 1623 of Title 18, United States Code is constitutional.

Appellant contends that Section 1623 of Title 18, United States Code, is unconstitutional because its elimination of the "two witness" rule violates the due process and equal protection guarantees of the Fifth Amendment. There is no merit to the argument.

The courts that have had occasion to consider the constitutional challenges presented here have uniformly sustained the validity of the statute. *United States* v. *Ruggiero*, 472 F.2d 599, 606 (2d Cir.), *cert. denied*, 412 U.S 939 (1973); *United States* v. *Isaacs*, 493 F.2d 1124, 1155-56 (7th Cir.), *cert. denied*, 42 U.S.L.W. 3692 (1974); *United* v. *Koonce*, 485 F.2d 374, 376-78 (8th Cir. 1973); *United States* v. *Ceccerelli*, 350 F. Supp. 475, 477-78 (W.D. Pa. 1972); *United States* v. *McGinnis*, 344 F. Supp. 89, 92 (S.D. Tex. 1972). Appellant has utterly failed to demonstrate any reason why this Court's holding in *Ruggiero*, decided less than two years ago, should be reconsidered.

Nor is there any merit to the contention that the word "material" is unconstitutionally vague. In *United States* v. *Ceccerelli*, *supra*, 350 F. Supp. at 477, the District Court rejected the argument made by Lee on this appeal in words which bear repetition here:

> ". . . Defendant next argues that 18 U.S.C. § 1623 is unconstitutionally vague since a man of

common intelligence would not understand the meaning of the word 'material.' Defendant argues that by using the word 'material.' Congress used a legal term of art 'beyond the competence of the man-on-the-street', and therefore the statute lacks the narrow specificity required to protect it from constitutional attack.

We disagree. The word 'material' is, no doubt, a legal term of art. But it does not follow that the statute is therefore unconstitutionally vague. The word 'material' is used in § 1621 (the old perjury Section) as well as § 1623, and materiality has traditionally been an element of the crime of perjury.

We consider it highly persuasive that in the long line of cases interpreting § 1621 neither defendant nor the court has found any which declare the materiality standard constitutionally defective. If 'material' has not been found to be unduly vague in § 1621 we do not think it is defective when used in an identical context in § 1623. . . ."

POINT VIII

The Government's bill of particulars was adequate.

Lee's final complaint on this appeal is that the Government's bill of particulars did not disclose with sufficient specificity the dates of all the payoffs proved at trial and thereby prevented Lee from presenting an alibi defense. The argument has no merit.

In his pre-trial request for discovery, Lee asked for precise details as to the dates of the incidents when Government witnesses observed him taking money. The Government initially indicated that many of its witnesses

could not provide specific dates. Thereafter, Judge Breiant directed the Government to provide Lee with the names of all witnesses it intended to call and as much detail as possible with respect to dates and places (Hearing, November 7, 1973, Tr. 14). The Government by letter dated November 9, 1973 provided appellant with a list of dates and places when and where he had received payments or gifts or had admitted receiving such payments or gifts. The names and dates provided were the best information available (Tr. 5).*

When the trial began, the District Court invited the defense to move for a continuance since the defense had received the list of witnesses and dates and places several days before. Defense counsel declined, specifically waiving any claim of surprise (Tr. 8-11).**

On this appeal, there is no claim that the defense was surprised at trial or that the Government did not furnish the best information available concerning the dates of the alleged payoffs. Whatever information the Government, in fact, had was furnished. See *United States* v. *Roberts*, 264 F. Supp. 622, 624 (S.D.N.Y. 1966); *United States* v. *Cohen*, 39 F.R.D. 45 (S.D.N.Y. 1965).

The narrow claim on this appeal rather is that lack of specificity in the bill of particulars and in the evidence itself precluded an alibi defense. With respect to Count

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* The dates provided ranged from the very specific, *e.g.*, August 23, 1970 and Christmas during each of the years 1963 through 1970 to the approximate, *e.g.*, the summer of 1970 and in some instances, to having occurred over a period of several specified years.

** This was consistent with the position which defense counsel adopted during the pre-trial argument on discovery when he also declined the District Court's invitation to have the case postponed and when he asserted that *he did not need* any of the information that he asked for in his letter requesting particulars and discovery (Hearing, November 7, 1973, Tr. 13).

One, however, two of the witnesses against Lee, Maney and Stacklum, specified August 23, 1970 and Christmas of 1968 and 1969, respectively, for the incidents which they described. With a single exception,* all of the other incidents proved under Count One and the payment by Boone proved under Count Three, were placed during a specific season of a specific year. The proof was sufficiently precise as to when the events occurred. See *Ledbetter* v. *United States,* 170 U.S. 606, 612 (1898); *Whitlock* v. *United States,* 429 F.2d 942, 945 (10th Cir. 1970); *Butler* v. *United States,* 197 F.2d 561, 562 (10th Cir. 1952); *Weatherby* v. *United States,* 150 F.2d 465, 466-67 (10th Cir. 1945); *Hale* v. *United States,* 149 F.2d 401, 403 (5th Cir. 1945); *United States* v. *Nomura Trading Co.,* 213 F. Supp. 704, 706 (S.D.N.Y. 1963); *United States* v. *Mathews,* 68 F. 880, 881 (S.D.N.Y. 1895), *aff'd,* 161 U.S. 500 (1896); *United States* v. *Wells,* 180 F. Supp. 707, 708 (D. Del. 1959); *United States* v. *Benton and Co., Inc.,* 345 F. Supp. 1101, 1103 (M.D. Fla. 1972); *United States* v. *Gaag,* 237 F. 728, 730 (D. Mont. 1916).

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* Maney could only recall that the occasion on which he saw Lee with money after Lee and Skipwith were together occurred some time in 1964.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

JEROME L. MERIN----------

deposes and says that he is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 5th day of December, 1974 he served a copy of the within Brief by placing the same in a properly postpaid franked enveloped addressed:

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and

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And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jerome L. Merin

Sworn to before me this
5th day of December, 1974

LAWRENCE S. FELD
Notary Public, State of New York
No. 31-6258852
Qualified in New York County
Commission Expires March 30, 1976